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BRIEF FOR RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 736

KING DAVID, *Petitioner*,

v.

ROBERT O. CLOUSER, et al., *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PRINTING DIVISION—D. C. GOVERNMENT

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STATEMENT OF QUESTION PRESENTED

Is there not substantial evidence in the administrative record to support the denial of the petitioner's appeal (application) for a variance from the Zoning Regulations to permit his residentially-zoned property to be used for commercial purposes?

ADDITIONAL REGULATIONS INVOLVED

Zoning Regulations of the District of Columbia, effective May 12, 1958:

Section 7101—*Statement of Purpose*

> 7101.1 These regulations establish separate *districts*, each of which is an appropriate area for the location of uses and *structures* permitted therein. It is necessary and consistent with the establishment of these *districts* that all uses and *structures* incompatible with permitted uses or *structures* be regulated strictly and permitted only under rigid controls. Therefore, it is the purpose of this article to provide for strict regulation of *nonconforming uses and nonconforming structures.*

Section 7102—*Application of Provisions*

> 7102.1 Any *nonconforming use* of a *structure* or of land, or any *nonconforming structure* lawfully existing on the effective date of these regulations which remains nonconforming, and any use or *structure* which shall become nonconforming on the effective date of these regulations or any subsequent amendment thereto may be continued, operated, occupied, or maintained subject to the provisions of this Article.

STATEMENT OF THE CASE

This controversy resulted from the refusal by the Board of Zoning Adjustment to grant the petitioner, under Section 8 of the Act of June 20, 1938, ch. 534, 52 Stat. 799 (Section 5-420 (3), D. C. Code, 1961), a variance from the Zoning Regulations of the District of Columbia so as to permit his residentially-zoned property to be used for commercial purposes (J. A. 12-20).[1] That section provides, in pertinent part, as follows:

[1] All "J. A." references are to the joint appendix filed in the United States Court of Appeals for the District of Columbia Circuit.

> Upon appeals the Board of [Zoning] Adjustment shall have the following powers:
>
> . . . . . .
>
> (3) Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under sections 5-413 to 5-428 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from such strict application so as to relieve such difficulties or hardship, provided such relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map.

The evidence at the hearing before the Board of Zoning Adjustment was in substance as follows:

The property of petitioner, located at 1916 Eleventh Street, Northwest, was purchased by the petitioner on December 6, 1960 (J. A. 16), approximately 2½ years subsequent to the adoption of the present zoning regulations. The nineteen hundred block of Eleventh Street is developed with row dwellings (J. A. 46). Such dwellings, with the exception of approximately six which house light commercial enterprises under the non-conforming use provisions of Section 7102.1 of the Zoning Regulations, are presently being used for residential purposes [2] (J. A. 46).

[2] The nineteen hundred block of Eleventh Street was zoned First Commercial prior to the adoption in May, 1958, of the present Zoning Regulations (J. A. 45).

Petitioner, after expending approximately $4,000 in making repairs to and refurbishing his premises, moved his law office into the first floor of the building (J. A. 11, 29). He then applied to the Department of Licenses and Inspections for the necessary occupancy permit, which was denied because the premises were being used in violation of the Zoning Regulations (J. A. 11).

The building is equipped with a kitchen and two baths (J. A. 35), and the upstairs is designed for residential use (J. A. 27). Petitioner told the Board that, if the variance is granted, he would either move his residence into the building or make it all into offices (J. A. 27). He admitted to the Board that the property could be used for residential purposes without any major expenditures (J. A. 33, 35). He stated, however, that to do so would result in an economic hardship, because he has put more money into the building than he could realize from a sale or rental thereof for residential purposes (J. A. 33).

The Board, in denying the variance, found (1) that petitioner's property is not of such a nature that a use of it under its present zoning would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon him, and (2) that to grant the variance requested would result in substantial detriment to the public good, and substantially impair the intent, purpose, and integrity of the zone map as embodied in the zoning regulations and map (J. A. 47).

The United States District Court for the District of Columbia, upon consideration of the record before it, which included a transcript of the record before the Board of Zoning Adjustment, concluded that the Board's denial of the variance was arbitrary and capricious, and granted the petitioner summary judgment on his complaint for injunctive relief (J. A. 53-55). Holding that the District Court erred in substituting its judgment for that of the Board

of Zoning Adjustment, the United States Court of Appeals for the District of Columbia Circuit reversed, saying:

> * * * The practical difficulties or hardship to which the plaintiff is subjected must be due either to "exceptional narrowness, shallowness, or shape" of the property, or else to the property's "exceptional topographical conditions or other extraordinary or exceptional situation or condition." As the Board said in its opinion, "The lot is of normal size and shape, and the existing structure was erected as a dwelling and can be used for such with a minimum of cost for conversion." As the Board says in its brief, "Hardship, if any, has not resulted from the location, situation, or condition of the property, but solely from appellee's appropriation of it for commercial purposes without first having obtained the necessary change in zoning. * * *" (App. 3a)

ARGUMENT

I

The administrative record amply suppports the findings and decision of the Board of Zoning Adjustment.

Petitioner's property is located in an R-4 Zoning District. "The R-4 District is designed to include those areas now developed primarily with *row dwellings*, but within which there have been a substantial number of conversions of such *dwellings* into *dwellings* for two or more *families*. * * *" Section 3104.1 of the Zoning Regulations for the District of Columbia. Under the provisions of Section 5-420 (3), D. C. Code, *supra*, the Board of Zoning Adjustment is empowered to grant a variance from the present zoning "[w]here, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a

specific piece of property, the strict application of any [zoning] regulation * * * would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property. * * *" Such relief, however, cannot be granted if it will result in "substantial detriment to the public good" or will substantially impair " * * * the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map."

By petitioner's own admissions to the Board, it was established that his property could easily be used for residential purposes under its present zoning. In response to a question by the Chairman of the Board as to what would be required to restore the building to residential use, the petitioner replied, "What would be required? Nothing" (J. A. 33). In his amended complaint filed in the District Court, the petitioner alleged that "[h]e purchased said premises solely because of a belief that it could be used as an Attorney's Office *and a dwelling* * * *" (J. A. 12). [Emphasis supplied.] Nowhere has he shown that the premises cannot be used as a dwelling. His whole concern is summarized in the allegation in his original complaint wherein he states "[t]hat altho the premises could be used for its zoned purpose, he was not financially able to maintain and retain said premises for such use" (J. A. 4, 7). As can be seen from Section 5-420 (3), *supra*, economic hardship is not sufficient to entitle one to a variance. See also: *Village of Euclid* v. *Ambler Realty Company*, 272 U. S. 365; *Leventhal et al.* v. *District of Columbia, et al.*, 69 App. D. C. 229, 100 F. 2d 94; *Salyer* v. *McLaughlin*, 100 U.S. App. D. C. 29, 240 F. 2d 891.

II

The respondents are without authority to amend the Zoning Regulations or Map.

The brunt of petitioner's argument is that the Zoning Regulations are discriminatory in that they permit the zoning. * * * (App. 2a 3a)

establishment of medical and dental offices in residential areas to the exclusion of legal offices. He also argues that his property is located in an area better suited for commercial purposes.

The authority to make the changes suggested by the petitioner has been vested solely in the Zoning Commission of the District of Columbia, which is not a party to this lawsuit. See Sections 5-413 and 5-417, D. C. Code, 1961. As can be seen from Section 8 of the Act of June 20, 1938, ch. 534, 52 Stat. 799 (Section 5-420, D. C. Code, 1961), the Congress has provided that "* * * [t]he Board of [Zoning] Adjustment shall not have the power to amend any regulation or map."

III

The Board of Zoning Adjustment was properly organized.

Petitioner argues for the first time that a member of the Board of Zoning Adjustment serves also as Director of Planning for the Zoning Commission, and thereby sits in judgment on Zoning Regulations which he himself has promulgated. He contends further that this is a violation of the Administrative Procedure Act of 1946.

The short answer to this contention is that the Administrative Procedure Act is not applicable to the District of Columbia, U. S. Code, Title 5, § 1001.

In any event, the Congress, by Section 5-420, D. C. Code, 1961, has specifically provided that the Board of Zoning Adjustment shall be composed of five members, one of whom shall be a "* * * member of the Zoning Commission or a member of the staff thereof to be designated in either case by such Commission * * *." It is clear, therefore, that Mr. Robert Clouser, a member of the staff of the Zoning Commission, sits as a member of the Board of Zoning Adjustment pursuant to congressional mandate. Furthermore, the Zoning Commission and not Mr. Clouser

promulgates the Zoning Regulations, and neither Mr. Clouser nor any other member of the Board of Zoning Adjustment sits "in judgment" on any Zoning Regulations. As previously pointed out, this function rests solely within the province of the Zoning Commission.

CONCLUSION

It is respectfully submitted that the record and authorities fully support the judgment of the Court of Appeals, and that the petition for writ of certiorari should, therefore, be denied.

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